IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1056

BERTRAM ZWEIBON, MARILYN BETMAN, IRVING CALDERON, STUART C. COHEN, SHELDON DAVIS, JEROME EISENBERG, LAWRENCE H. FINE, EILEEN GARFINKLE, RUTH HARTSTEIN, LIBBY KAHANE, MEIR KAHANE, HARRY PEARL, NEIL S. ROTHENBERG, MURRAY SCHNEIDER, ELI SCHWARTZ and ALEX STERNBERG,
Petitioners,

v.

JOHN N. MITCHELL, MALCOLM J. BARRETT, ALFRED E. CAMIRE, H. F. DOHERTY, ANTHONY T. TRABIK, A. M. GANSKY, GERALD C. HOLLAND, R. W. PATTERSON, EDDIE A. SODOLAK and W. R. SWEENEY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-114a *infra*) is reported at 516 F.2d 594. The opinion of the district court (App. B, pp. 115a-123a, *infra*) is reported at 363 F. Supp. 936.

JURISDICTION

The opinion and judgment of the court of appeals were filed on June 23, 1975. On August 29, 1975, the court of appeals denied a timely petition for rehearing (App. C, p. 124a, *infra*). On November 20, 1975, the

Chief Justice extended petitioners' time for filing a petition for a writ of certiorari to and including January 26, 1976 (App. D, p. 125a *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the statutory damage remedy provided by 18 U.S.C. §.2520 to individuals whose conversations are intercepted in violation of Title III of the Safe Streets Act of 1968 is unavailable if the defendants establish a subjective good-faith belief, reasonably held, in the lawfulness of their conduct.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2520 provides as follows:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT

During the entire month of October 1970 and between January 7, 1971 and June 20, 1971, the Federal Bureau of Investigation—through the nine agents named as defendants in this action—monitored six telephone lines belonging to the New York City offices of the Jewish Defense League ("JDL"). The wiretap had not been authorized by any warrant and no request for judicial authorization was ever sought. The existence of the surveillance was publicly disclosed—while it was still in active operation—on June 18, 1971, during the pretrial stage of a criminal action brought against some members of the JDL in the Eastern District of New York. Although several of the defendants in that action had continued to use the JDL office telephones after their indictment, the surveillance was not terminated until June 30, 1971, the expiration date of the second of two 90-day wiretaps approved in internal Justice Department memoranda.

The highest authority approving the wiretap was the defendant John Mitchell, who was then Attorney General. On September 14, 1970, and again on January 4, 1971, and on March 31, 1971, Mr. Mitchell gave the then Director of the FBI, J. Edgar Hoover, approval to monitor the telephones at the JDL office. On each occasion the approval was based on a Hoover memorandum of less than two pages, which emphasized principally the JDL's record of public violence against Soviet and Arab diplomats. As a result of the surveillance, which lasted approximately seven months, thousands of telephone conversations were intercepted, including many made to the JDL offices by members of the public who were calling to learn about an organization that was publicly prominent and that was en-

gaged in substantial protest activity indisputably protected by the First Amendment.

Plaintiffs—among whom are some of the individuals who had been indicted in the Eastern District of New York [1]—brought this suit to recover statutory and common-law damages for the unlawful interception of their telephone conversations during the seven-month period.[2] They based their claim, *inter alia*, on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and particularly on 18 U.S.C. § 2520 which authorizes those whose conversations are intercepted in violation of the statute to recover "actual damages" in a minimum liquidated amount ($100 per day or $1000) in addition to punitive damages, attorneys' fees and litigation costs.

After some discovery was conducted, all parties moved for summary judgment. The district court granted the defendants' motion on the ground that the warrantless wiretap of the JDL offices was lawful. The district judge concluded that the activities of the JDL "were obviously detrimental to the continued peaceful relations between the United States and the Soviet Union" and that this made the surveillance a "proper exercise of the President's constitutional authority to

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[1] Before trial in that case, three of thirteen defendants pleaded guilty to one count. The prosecution then *nol prossed* the charges against the remaining ten defendants.

[2] The suit was instituted as a class action on behalf of all persons speaking over the tapped wires during the period of the surveillance. The district court refused, however, to rule on the plaintiffs' motion to certify the class. The number of individuals affected and conversations overheard during the seven-month period may be inferred from the government's representation in the district court where it was first ordered to produce wiretap logs that there were "volumes and volumes" of such logs.

conduct the nation's foreign relations and his power to protect the national security" (App. B, p. 121a, *infra*). He held that Title III of the Safe Streets Act did not apply to "national security surveillances" which have "foreign aspects," and that such surveillance could be maintained without prior judicial authorization under the President's power to conduct foreign relations (App. B, pp. 121a-123a, *infra*).

The Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed the judgment unanimously, but issued six different opinions. On the principal issue—the legality of the surveillance—four judges (Chief Judge Bazelon and Judges Wright, Leventhal and Robinson) concluded that the wiretap was unlawful under both Title III of the Safe Streets Act and under the Fourth Amendment (which gives rise to a damage claim pursuant to *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971)). Two members of the court (Judges McGowan and Robb) did not reach the Fourth Amendment question because they believed that the Safe Streets Act prohibited the surveillance instituted here unless the statutory procedures prescribing a judicial warrant were followed. Two judges (Judges Wilkey and MacKinnon) concluded that installation of the JDL wiretap without a judicial warrant was a violation of the Fourth Amendment, but that it was not covered by the Safe Streets Act. Hence all eight judges agreed that the plaintiffs had a legally cognizable claim—under the statute, the Constitution or both.

Although the plurality opinion written by Judge Wright asserted, in an early footnote, that the court of appeals would leave, for initial decision by the district court, the validity of three affirmative defenses asserted

by the defendants—including the claim that damages should not be awarded "because the defendants acted in the good faith belief that their actions were lawful" (App. A, p. 14a, *infra*, n.18)—the concluding section of the decision set out "guidance concerning the standard of good faith that should be applied as a statutory defense to the liquidated damages claim" (App. A, pp. 77a-78a, *infra*). The opinion recognized that a "literal interpretation" of the language of Section 2520 would hold the defendants "strictly liable" for their participation in the surveillance and would recognize no defense based on a good-faith belief that such a warrantless wiretap was lawful. Consciously departing from the standard "literally specified" in Section 2520 (App. A, p. 78a, *infra*), the plurality opinion then directed the district court to deny a recovery if the defendants are able to establish (App. A, p. 78a, *infra*):

> (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and
>
> (2) that this belief was itself reasonable

This judicial gloss on the language of the Safe Streets Act was based on the assertion that Congress had intended that Title III procedures and remedies "be contingent upon further judicial pronouncements concerning the constitutional question reserved in *Katz*," on the "somewhat ambiguous" nature of the statutory language and legislative history as applied to "national security surveillance," and on the policy that "statutes in derogation of the common law should be relatively strictly construed" (App. A, pp. 78a-79a, *infra*). These considerations, it was said, make it unlikely that Congress intended to hold "Executive officials strictly liable for having erred in their assessment of the powers in fact constitutionally granted the President . . . ." (*ibid.*).

Judges Leventhal, Robinson and Robb (App. A, p. 8a, *infra*) joined this portion of Judge Wright's opinion. Judge McGowan, who had concurred separately in the judgment, gave no indication of his view on this issue (App. A, pp. 88a-96a, *infra*). Judges Wilkey and MacKinnon, who decided that there was, in no event, a cognizable claim under the Safe Streets Act, also expressed no view on the availability under Section 2520 of a defense of good-faith belief in the legality of the surveillance (App. A, pp. 96a-114a, *infra*). Chief Judge Bazelon dissented from the "guidance" given by the court on remand on the ground that Section 2520 would not permit, at least as to the then Attorney General, a defense that he committed a mistake of law (App. A, pp. 82a-88a, *infra*). He concluded that "Mitchell's actions fall directly within the intendment of the rule against mistakes of law: both to assert the primacy of the legislature and the judiciary in the making of law within their constitutional powers and to assert the duty of all citizens to know that law and obey it" (App. A, p. 87a, *infra*).

REASONS FOR GRANTING THE WRIT

As indicated in the brief argument that follows, we believe that the "good-faith defense" judicially created by the court below conflicts in principle with this Court's very recent decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), issued on June 25, 1975—the same day as the decision of the court of appeals in this case. We further believe, for reasons summarized below, that the ruling of the court of appeals is plainly and demonstrably wrong—both in terms of Congress' intent as shown in the legislative history and purpose of Title III of the Safe Streets Act and in terms of general tort theories of compensatory damages. Before turning to these matters, however, we emphasize an im-

portant practical consequence of the decision below which answers we believe, one objection to the granting of certiorari which may be asserted by counsel for the respondents.

1. We recognize that there is no conflict among the circuits over the question whether there is a "good-faith mistake of law" defense to an action under 18 U.S.C. § 2520; only the District of Columbia Circuit has considered the issue. We recognize, as well, that there are to be further proceedings in this case, and that the validity of a "good-faith defense" to the statutory liability involved in this case might also be available for consideration after a full trial under the remand instructions of the court of appeals. But this is no ordinary case. It is, in many respects, a bellwether in the area of civil damages for unlawful and unconstitutional eavesdropping. In this regard, there are, we submit, a substantial number of prospective plaintiffs—individuals who have reason to believe that they were, or are now, victims of warrantless electronic surveillance—who will look to the progress of this litigation to see whether the courts, implementing duly enacted legislation dealing precisely with this subject matter, can provide a "meaningful and effective remedy against unlawful conduct by government officials." *Bivens* v. *Six Unknown Agents*, 403 U.S. 383, 421 (Burger, C.J., dissenting).[3]

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[3] Moreover, the court of appeals itself recognized—by choosing to spell out for the district court what it thought to be the correct standard for determining liability under the Act—the importance to litigants and to the public of timely and efficient resolution of cases such as this, under the correct legal standard. That very purpose would be defeated if ultimate resolution of this issue were to be delayed by months and maybe years of possibly unnecessary litigation.

If this Court determines, at this juncture, to wait until some future time to decide the important question presented here, many plaintiffs will, in the interim, abandon their claims. If there is no chance of securing any damages whatever without proof of bad faith, there is little real incentive to turn to the judiciary for vindication of a victim's rights. The investment in a lawsuit is substantial, and the probability that a government official will be able to show that he entertained a good-faith belief in the lawfulness of his conduct is great enough that otherwise meritorious claims will be aborted—even though this Court may decide, at some remote future time, that Congress did not intend to permit a mistake of law, even if reasonable, to be a defense.

In this regard, we call to the Court's attention a letter from the present Attorney General to Senator Edward Kennedy dated June 24, 1975—the day before the decision below was issued—that appears as Appendix E to this petition (pp. 126a-133a, *infra*). The statistics submitted with that letter indicate that the volume of warrantless telephone surveillances has increased, rather than decreased, since this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1973). It appears from this letter that government officials have laid the groundwork for future assertions that their narrow reading of decisions prohibiting warrantless wiretapping is based on "good-faith beliefs" regarding existing law. It seems a fair inference that there must be more potential plaintiffs for whom Congress designed a civil remedy, and who will have little or no incentive to seek this remedy if no action is promptly taken to reverse the legal rule announced by the court below. Deferral of the issue is,

in this context, denial of a right which other plaintiffs would probably invoke. We believe, accordingly, that in the interest of dealing justly with those plaintiffs—as well as with the 16 petitioners here (and the very large class they seek to represent)—immediate consideration is warranted.[4]

2. The court of appeals' ruling conflicts, in principle, with this Court's decision of June 25, 1975. The remedy provided by 18 U.S.C. § 2520 parallels, in many respects, the backpay damage remedy authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). In fact, damages for unlawful electronic surveillance are *mandated* by Title III of the Safe Streets Act, whereas backpay for discriminatory employment practices is *discretionary* under the Civil Rights Act.[5] Yet in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that the discretionary language of the law must be read in light of the purposes of Title VII of the Civil Rights Act, and that these purposes require that there be a "reasonably certain prospect of a backpay award" as a catalyst to employees and as a means of "mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination." 422 U.S. at 417, 418. On this

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[4] We note also that if, as we believe, victims of warrantless electronic surveillances are, by this decision, deprived of any incentive to seek judicial relief, only those who become the subjects of criminal indictment will ever find out that they have been illegally wiretapped.

[5] The Civil Rights Act provides, in relevant part (emphasis added):

> "The court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which *may* include reinstatement or hiring of employees, *with or without backpay* . . . ."

basis, the Court rejected the very same contention upheld here by the plurality judges of the court of appeals. "If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries." 422 U.S. at 422.

Section 2520 does, of course, create a very specific and narrow defense of good-faith for a defendant; if he can establish that he relied "on a court order or legislative authorization" (which was originally enacted as "on a court order or on the provisions of Section 2518(7)"), he is not liable. Congress' selection of such a precise and limited good-faith defense to liability for illegal wiretapping is as clear a rejection of a more sweeping defense as is the narrow good-faith defense in Title VII (422 U.S. at 432, n.17, emphasis added):

> Title VII itself recognizes a complete, but very narrow, immunity for employer conduct shown to have been undertaken "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-12(b). *It is not for the courts to upset this legislative choice* to recognize only a narrowly defined "good faith" defense.

Mr. Justice Rehnquist, concurring in the *Albermarle Paper* case, made the same point (422 U.S. at 444; emphasis added):

> Good faith is a necessary condition for obtaining equitable consideration, *but in view of the narrower "good faith" defense created by statute, 42 U.S.C. § 2000e-12(b), it is not for this Court to expand such a defense beyond those situations in which Congress had made it applicable.*

3. The decision below is an erroneous ruling on an important question of federal law. The court of appeals recognized explicitly that the defense it was creating was inconsistent with the "literal language" of Section 2520, which authorizes only a particular kind of good-faith defense. It is obvious that if Congress truly intended, as the court of appeals opinion maintains, to recognize the general good-faith defense applied on remand in *Bivens*, 456 F.2d 1339 (2d Cir. 1972), the very specific concluding sentence of Section 2520 was totally superfluous. Or, at most, Congress only needed to say that "a reasonable good-faith belief in the lawfulness of his conduct" would constitute a "complete defense." The words "court order or legislative authorization" are, under this interpretation, totally unnecessary.

Moreover, the court of appeals' reading conflicts with Congress' broad remedial purpose in enacting Section 2520. The Senate Report on the Safe Streets Act states (S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968); emphasis added):

> All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. *But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages.* The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.

If civil damages are available only where the perpetrator has engaged in his conduct in bad faith, "the

victim of an unlawful invasion of privacy" would be made whole only if his defendant could also be criminally prosecuted. Similarly, the separate provision in Section 2520 of punitive damages would then overlap with all the other remedies: Where bad faith could be shown, criminal liability, punitive damages, and payment for actual harm suffered (together with attorneys' fees) would all be available; where there is no bad faith, none of these remedies could be invoked. We submit that Congress' intention to "strike at all aspects of the problem" so as to protect privacy "adequately" leaves no room for such interpretation. Rather, differing degrees of fault permit different judicial remedies, and the most straightforward redress—civil damages for actual harm suffered—should be the consequence of any unlawful invasion of privacy regardless of the defendant's culpability.

The rule annouced by the court of appeals frustrates the intent of Congress. So long as an Attorney General grudgingly acquiesces in judicial decisions in this area and does what the Department of Justice is apparently doing to this case—*i.e.*, reading it narrowly to probibit a very limited kind of electronic surveillance—public officials and the public treasury are shielded, by invocation of a "reasonable good-faith belief" defense, from any accountability whatever for acts that exceed lawful authority. The practical effect of such a judgment is to shift the risks and costs of official lawlessness from the perpetrators to the victims. Congress undertook to shield constitutional rights of privacy from governmental invasion by erecting a statutory warning to public officials who might read the Bill of Rights as narrowly as possible: they were told that they act, in this regard, at their peril. The goals of this major

remedial legislation have now been jeopardized by the decision below.

The ruling is, moreover, inconsistent with elemental principles of tort law. The victim of a wiretap suffers a personal injury as surely as the victim of assault, libel, or negligent action. Degrees of fault short of "bad faith" are proper bases for shifting to the tortfeasor the financial consequences of his conduct and removing that burden from the victim. Why should a higher standard of culpability be demanded before civil liability attaches to those who commit acts that they know to be extraordinary and irregular and that injure private parties in ways that are compensable under our law?[6] Why should they not be directed to make their victims whole as surely as a truckdriver responsible for a collision or a dynamite blaster whose business creates serious risk of harm to others?[7]

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[6] The question whether government officials who act in good faith within the zone of their employment should be entitled to indemnity for civil liability growing out of their actions is, of course, an open question. We note, in this regard, that in both courts below, the Department of Justice represented the defendants. See 28 U.S.C. § 516 and 31 Comp. Gen. 661 (1952).

[7] The justifications given by the court below for its result are insubstantial. Had Congress intended to make Section 2520 "contingent upon further judicial pronouncements," it could have drafted the "good-faith defense" as explicitly conditional on the state of the law when a surveillance is instituted. The "ambiguities" in Title III are nothing more or less than arguable readings of legislation, a common phenomenon in the trial and decision of civil lawsuits. In such suits it would be unheard of to deny damages to a plaintiff simply because there is a plausible legal construction on the defendant's side. And it is most unclear whether it is "in derogation of the common law" to grant damages to those harmed by invasions of privacy, or whether the court of appeals' rule—which conditions civil liability on bad faith—is more "in derogation of the common law."

CONCLUSION

This case presents two extremely important legal issues that affect pending litigation,[8] and the question we present here affects the decision of many people whether or not to seek judicial relief. It has been decided erroneously by the court below, and the effect of that ruling harms the petitioners as well as the broad remedial interests sought by Congress. This petition for certiorari should be granted.

Respectfully submitted,

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[8] Recognizing the importance of the question on which the court of appeals ruled in our favor, we would not oppose the granting of a petition for certiorari if the defendants seek to bring that issue to this Court.